

(1) D. B. CIVIL SPECIAL APPEAL (W) NO.365/96
(Jethu Singh v. R.S.R.T.C. & Others)

(2) D. B. CIVIL SPECIAL APPEAL (W) NO.393/96
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DATE OF ORDER :::: 21-09-2007

PRESENT

HON'BLE MR. JUSTICE BHAGWATI PRASAD
HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI

Mr.M.Mridul, Senior Advocate, assisted
by Mr. R.N. Upadhyay, for Appellants.

Mr.P. K. Lohra, for RSRTC – Respondent (s).

BY THE COURT: (PER HON'BLE MR. BHANDARI, J.):-

Appellant had preferred Writ Petition No.837/88 to challenge the order of dismissal as well as the order on appeal preferred against the order of dismissal dated 18.05.1987 and the order on appeal dated 11.01.1988. During the pendency of the aforesaid writ petition, the learned Industrial Tribunal, Jaipur passed an order, granting approval of the dismissal order dated 18.-05-1987 under Section 33 (2) (b) of the Industrial Disputes Act. Aggrieved by the order of the Industrial Tribunal, granting approval on the application moved by the Rajasthan State Road Transport Corporation (hereinafter referred to as 'the

Corporation'), petitioner preferred Writ Petition No.5223/94. Both the writ petitions were, thereafter, heard together and decided by a common judgment dated 24.05.1996. The appellant has preferred these appeals against the judgment of the learned Single Judge.

Since the petitioner had preferred two writ petitions, thus for convenience, Writ Petition No.837/88 and appeal arising out of it are taken up first. In the aforesaid writ petition, petitioner challenged the dismissal order, mainly on the grounds that without considering the reply filed by the petitioner showing the reasons and circumstances as to why tickets could not be issued, order of dismissal was passed by the Disciplinary Authority. The Disciplinary Authority had failed to consider that there exists no evidence to show that the petitioner involved in corrupt practices, yet, for technical breach, disproportionate punishment of dismissal was passed. The petitioner had also challenged order of Appellate Authority on the ground that the same was not a speaking order. The facts pertaining to the said writ petition are that the petitioner was charge-sheeted vide the charge sheet dated 15.09.1986, containing allegations that at the time of inspection of the bus on 12.09.1986, forty-eight passengers were found without tickets, though Conductor had already collected fare from those passengers, before checking

and, if bus would not have been checked, petitioner being driver and conductor of the bus, would have misappropriated money of the Corporation. In that regard, the petitioner failed to follow instructions where Corporation had instructed that the bus should be started only after issuance of tickets to all passengers and after recording entires in the way bill, bus should be started by the driver. On those charges, inquiry was conducted and when charges were found to be proved, Corporation passed an order of dismissal. Aggrieved by the order of dismissal, the petitioner had preferred appeal before the Appellate Authority, but the same was also dismissed. In para 8 of the writ petition, the petitioner had stated that the petitioner was even served with an application moved by the Corporation before the Industrial Tribunal, Jaipur to seek approval of the order of dismissal under Section 33 (2) (b) of the Industrial Disputes Act (for short, the ID Act').

The first writ petition was dismissed by the learned Single Judge, mainly on the ground of submission of false statement on oath regarding unavailability of efficacious and alternative remedy, apart from ground of laches and delay. Learned counsel for the appellants urged that the writ petition was wrongly dismissed by the learned Single Judge, ignoring the fact that if the charge-sheet as well as reply to the charge-sheet is

looked into, then, it becomes clear that no charge was made out against the petitioner-appellant. It was submitted that charge was satisfactorily replied by submitting reply, where it was stated that forty-eight passengers had boarded the bus all of a sudden. It was explained that a private bus carrying those passengers had broken down on the way, therefore, to help the passengers of that bus, those forty-eight passengers were taken and so far as the petitioner is concerned, he had directed Conductor to issue tickets to all those passengers and then he will start the bus, but, existing passengers made a protest for stopping the bus and, therefore, the bus had to be started without issuance of tickets. According to the learned counsel, reason given for non-issuance of tickets, was quite satisfactory, yet an order of dismissal was passed. During the course of arguments, of appeal, when the learned counsel for the appellant was asked as to why jurisdiction of this Court under Article 226 of the Constitution of India was invoked, when efficacious alternative remedy was available under the provisions of the Industrial Disputes Act, more so, when question of facts as to whether reason given in the reply, was correct or not, cannot be adjudicated by the High Court while exercising its extraordinary jurisdiction, no satisfactory reply was given, other than an argument that looking to a technical fault of the driver, it was not necessary for him to invoke the provisions of the Industrial

Disputes Act which otherwise were bound to take long time for adjudication.

We have carefully considered this aspect of the matter and we do not find ourselves in agreement with the argument given by the learned counsel for the appellant. The petitioner cannot be given liberty not to avail efficacious alternative statutory remedy under the provisions of the Industrial Disputes Act, only for the reason that the petitioner had apprehended delay of disposal of the matter under the mechanism provided under the Industrial Disputes Act. Thus, apart from fact that false declaration of non-availability of efficacious alternative remedy was given by the petitioner in Writ Petition No.837/88, we are not otherwise satisfied that there exists any justification not to avail efficacious alternative remedy in this case, where the question of facts are involved and which otherwise cannot be decided by the High Court under its extra-ordinary jurisdiction. There exists other reasons for treating Writ Petition No.837/88 to be infructuous, apart from it not being maintainable on the ground of availability of efficacious alternative remedy. During the pendency of the writ petition, approval application submitted by the Corporation under the provisions of Section 33 (2) (b) of the Industrial Disputes Act, was decided by the Industrial Tribunal, Jaipur and against the said order also, the petitioner

had preferred Writ Petition bearing No.5223/94. Thus, dismissal order, having adjudicated to the extent of the jurisdiction, exists under Section 33 (2) (b) of the Industrial Disputes Act and the order passed by the Tribunal granting approval of the order of dismissal being challenged, the first writ petition cannot still survive, because while adjudicating the approval of application under Section 33 (2) (b), the Tribunal not only adjudicated the issues regarding basic compliance of the provisions of Section 33 (2) (b) of the Industrial Disputes Act, but also adjudicated as to whether an inquiry was conducted after providing proper opportunity of hearing to the employee or not and lastly, as to whether prima facie, charge against the employee is made out or not ? The approval application, having been decided, the order of dismissal cannot be challenged in isolation, therefore, we find that the first writ petition has rightly been dismissed by the learned Single Judge on the ground that false declaration regarding alternative remedy and we further held that the said writ petition was not otherwise maintainable due to availability of efficacious alternative remedy, coupled with the fact that the Industrial Tribunal had granted approval of the order of dismissal during the pendency of the writ petition. Thus, we are not inclined to interfere with the order of dismissal of the writ petition No.837/88.

So far as Writ Petition No.5223/94 and appeal arising out of it are concerned, the petitioner had challenged the order of the Tribunal granting approval of the order of dismissal, mainly on the ground that the employee was not paid due one-month salary as mandated under the provisions of Section 33 (2) (b) of the Industrial Disputes Act. It was submitted that pursuant to the Rajasthan State Road Transport Corporation (Revised Pay Scale) Regulations of 1987 (for short, the Regulations'), the petitioner was entitled for the benefit of revised pay scale w.e.f. 1st September, 1986. However, while passing the order of dismissal dated 18.05.1987, those benefits of revised pay were not extended and thereby, the petitioner employee was not offered full one-month salary, hence in those circumstances, approval application should have been rejected on that ground alone. The another ground set out in the writ petition was that there exists discrimination in the action of the Corporation, inasmuch as, the order of dismissal was not only passed against the petitioner being driver, but was also passed against the conductor who was also charge-sheeted on the delinquency on the same facts. However, Corporation's approval application moved against the conductor was dismissed by the Tribunal on the ground short payment of one-month salary. Thus, in that case, the Corporation ought to have passed a new order of dismissal by making payment of one-month full salary. But,

surprisingly, after rejection of the approval application, no further action was taken by the Corporation. Thus, for one and the same facts, petitioner, being driver, suffered consequence of dismissal order, whereas, Conductor was retained in service, after rejection of the approval application. A further question was raised that when the Tribunal has already adjudicated issue of short payment of one-month salary in reference to the same fact in the case of conductor, then the order of the Tribunal passed in the case of the Conductor should have been applied to the petitioner also, but Tribunal failed to do so. Considering this aspect, it was held by the Tribunal that the approval application filed against the conductor was decided by taking note of a wrong date of dismissal, therefore, a wrong committed in the order of the Tribunal cannot be taken as a precedent, hence the order of the Tribunal in the case of conductor cannot be applied in the present matter. So far as the first issue regarding non-payment of one-month salary, after extending the benefit of Revised Pay-scale Rules of 1987, it was held that those revised pay scales were brought in effect by the Corporation vide order dated 15.04.1987 where it was provided that employee can opt revised pay scale within a period of two months and if no such option is given, within the specified period, then, revised pay rules would apply automatically. In the present case, period of two months expired much after order of

dismissal, inasmuch as, the order of dismissal was issued on 18.05.1987, hence before completion of formality of option within a period of two months, no employee was given benefit of revised pay scale. Thus, petitioner could not have been given benefit of revised pay scale before expiry of two months period. So far as the issue of discrimination is concerned, it is noticed that said issue cannot be mounted on the basis of a wrong committed by the Corporation.

The learned Single Judge dismissed the second writ petition, firstly on the ground that no case of discrimination is made out, for the reason that the order of the Tribunal passed in the case of conductor is not being produced before the High Court, thus, oral submissions made by the learned counsel for the petitioner cannot be accepted. Secondly, questions of facts cannot be decided by the High Court while exercising its jurisdiction under Articles 226 and 227 of the Constitution. It was further held that an alternative remedy is available to the petitioner, therefore, the writ petition cannot be entertained.

Aggrieved by the said judgment, the petitioner had preferred another appeal. Learned counsel for the appellant urged that learned Single Judge has failed to decide any of the issues raised during the course of hearing. It was argued that

the issue regarding non-payment of one-month salary as provided under Section 33 (2) (b) of the Industrial Disputes Act is necessarily a question of law and not of facts, thus, said issue should have been adjudicated by the learned Single Judge. It was argued that there exists no alternative remedy against the order of approval. However, learned Single Judge decided second writ petition after mixing facts of two writ petitions, which was not proper and for that reason alone, issue of availability of alternative remedy is being taken up while deciding the Writ Petition No.5223/94. According to the learned counsel, the view taken by the learned Single Judge was not proper and, for that reason the ground of discrimination at the instance of Corporation could not be decided by the learned Single Judge. The learned counsel for the appellant has focused following grounds to challenge the action of the management and the order of the Tribunal as well as the Judgment of the learned Single Judge :-

(1) The provisions of Section 33 (2) (b) are violated by not making payment of one-month salary, after fixing the salary of the employee under the Revised Pay Scale Rules of 1987.

(2) The Corporation made discrimination between the conductor and driver, inasmuch as, matter against the Tribunal (appellant) is being pursued to maintain order of dismissal,

whereas similar action was not taken against the conductor. The Corporation ought to have passed fresh order of dismissal against the conductor immediately after following the provisions of Section 33 (2) (b) of the Industrial Disputes Act.

(3) The Tribunal ought to have maintained its order while rejecting the approval application in the case of the conductor. However, a different treatment was given to the appellant, though his case was identical.

(4) Lastly, it was urged that it was not a case where the Driver should have been punished with the ultimate punishment of dismissal, looking to the satisfactory reply given to the charge-sheet.

Learned counsel for the respondents vehemently argued that the employee was given due one-month salary as the order for fixing the revised pay came in effect subsequent to the passing of the order of dismissal, hence it was submitted that no employee was given benefit of fixation prior to expiry of two months period from the issuance of order dated 15.04.1987. It was further submitted that even appellant could not focus that it is a case of short payment of one month salary by disclosing the figures of short payment. Thus, according to the leaned counsel

for the respondents, all the arguments raised by the appellant on this issue remains only academic in nature.

So far as the other issues like the issue of discrimination between the conductor and driver, it was urged that the conductor was subsequently dismissed in other misconduct. Thus, his matter relating to earlier misconduct was not taken up, therefore, there was no discrimination in two sets of employees. It was further argued that even one wrong cannot be given right of equality to others as it will amount to perpetuation of illegality. It was lastly urged that the reply of the charge-sheet given by the appellant was taken note of in the process of inquiry, where finding of fact was arrived at, hence mere making a statement of fact by the employee cannot mean that the same should be accepted without digging out the truth by evolving a process of recording finding of fact. It was submitted that when due inquiry was conducted followed by grant of approval, question of facts cannot be raised by the petitioner and so far as the earlier judgment of the Tribunal in the case of conductor is concerned, approval application was rejected by recording a wrong date of dismissal, said judgment cannot be taken as a precedent, being a decision on wrong facts.

We have considered the rival submissions of the learned

counsel for the parties in regard to Appeal No.365/96 also and scanned the matter carefully. The first ground raised by the learned counsel for the appellant is regarding non-compliance of the provisions of section 33 (2) (b) of ID Act. at the time of moving approval application by the Corporation. The contention of the learned counsel is that the appellant should have been given benefit of revised pay scale and, thereafter, calculation of one-month salary should have been made. The order dated 15.04.1987 has been referred in the writ petition and relevant portion has also been quoted therein. Perusal of that notice shows that revised pay scale was to become applicable to the employees from the date they opt for it though actual benefits to be given from 01.07.1986 and for that reason, every employee was given chance of giving his option within a period of two months. The period of two months was to expire on 15.06.1987, whereas, the dismissal order was passed prior to it and it is not on record that any employee was given benefit of revised pay-scale prior to passing the order of dismissal, rather same was not even possible for the reason that when benefit of revised pay scale was subject to option of the employees within a period of two months, then, obviously, Corporation was under an obligation to wait for each employee to see as to whether the employees are giving their options or not and subject to submissions of options by the employees within a period of two

months, benefit of revised pay scale was to be given. Though it is true that once a period of two months expired, the benefit of revised pay-scale was to be given w.e.f. 01.07.1986. Thus, in these circumstances, we cannot agree with the argument of the learned counsel for the appellant that there is violation of the provisions of Section 33 (2) (b) of the Industrial Disputes Act by not making due payment of one-month salary. During the course of arguments, we also asked learned counsel for the appellant as to what is difference of amount, if their argument is accepted, however, no figure was given and even no such figure exists in the record. Thus, we cannot accept an argument for academic discussion, unless it is shown that on account of a ground raised, there was in fact a proved violation of the provisions of Section 33 (2) (b) of the Industrial Disputes Act. In absence of availability of such facts and figures, we cannot accept the argument of the learned counsel for the appellant. Thus, first argument is not accepted.

So far as the second argument is concerned, it has been urged that there was discrimination in the action of the Corporation as when the approval application of the conductor was rejected, then no further action was taken against him in regard to delinquency based on same facts on which appellant was otherwise dismissed. We have considered this argument in

the light of the submission made by the learned counsel for the non-appellant and find that even the conductor was subsequently dismissed for delinquency in the other case, though it is not a justified excuse of the Corporation. The Corporation was under an obligation to take a prompt action against the conductor when approval application moved in his case was rejected by the Tribunal on a technical ground that is short remittance payment of one month salary, more so, when even the conductor was involved in misappropriation of public money. Thus, in our opinion, there was a serious lapse on the part of the officials of the Corporation, but because of their wrong, petitioner is not entitled for a benefit, because a case of discrimination cannot be mounted on the basis of a wrong committed by the Corporation. It is now settled that violation of Articles 14 and 16 can be claimed by an employee on his own rights and not based on palpably wrong committed by others, more so, when it amounts to perpetuation of illegality. The Corporation, however, tried to justify their action by showing that the conductor was ultimately dismissed from service. In view of the discussion made, we cannot recognize right of the appellant to claim equality on the ground of an illegality committed by the Corporation, because an employee has to stand on his own legs to claim right of equality and, in these circumstances, we are not inclined even to accept the second

argument of the learned counsel for the appellant.

The next argument of the learned counsel for the appellant is that even though approval application filed by the conductor was dismissed on the ground of non-payment of due one-month salary, however, when the same issue was raised by him, the Tribunal has not accepted it in an illegal manner. This issue was discussed by the Tribunal at length, where it denied to rely on its earlier order for the reason that the order was passed on wrong facts which was then made clear in this case. We are inclined to accept the finding recorded by the Tribunal in this regard, because when it is shown that based on wrong fact, the judgment was given by the Tribunal in the case of conductor, therefore, if the argument of the learned counsel for the appellant is accepted, then it would mean that despite of knowing of this fact, the Tribunal is to be asked to follow a wrong judgment which, in our considered view, cannot be a correct direction to be issued. Thus, in view of the above facts, the argument of the learned counsel for the appellant has not impressed us.

Lastly, the submission of the learned counsel is that looking to the satisfactory reply given by him, the order of punishment should not have been passed, more so, when a

driver cannot be given duty to monitor issuance of tickets to all passengers before start of bus. It was argued that all forty-eight passengers boarded the bus in a peculiar circumstance when private bus was broken down on the way. Firstly, this Court cannot appreciate question of facts. Secondly, the explanation is not proper, for the reason that the fare had already been collected from those passengers, thus, justification of non-issuance of tickets to forth-eight passengers by the conductors cannot be accepted, more so, if appellant had followed the instruction of the Corporation and would not have started the bus before issuance of tickets, the conductor remained with no option but to issue tickets. In those circumstances also when the factual aspect was inquired upon by the Inquiry Officer followed by an order of dismissal and approval of the same by the Tribunal, we cannot look into the facts of the case to re-appreciate a finding of fact and so far as the duties of driver are concerned, Corporation, having issued a Circular, same cannot be violated by a driver. The Division Bench of this High Court in D. B. Civil Special Appeal No.125/85, decided on 01.02.1985 has already held that if the driver fails to follow the directions and instructions issued by the Corporation, then he is liable to be punished, the similar arguments as is involved in the present matter. Thus, we are not inclined even to accept the last contention of the learned counsel for the appellant, more so,

when we are only adjudicating an outcome of approval application moved under Section 33 (2) (b) of the Industrial Disputes Act.

In view of the discussions made above, we are not impressed by any of the arguments of the learned counsel for the appellants, therefore, both the appeals fail and the same are dismissed accordingly with no order as to costs.

(MUNISHWAR NATH BHANDARI),J(BHAGWATI PRASAD),J

scd.